

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

J.E.C.M., et al.,	.	Civil Action No. 1:18cv903
	.	
Plaintiffs/Petitioners,	.	
	.	
vs.	.	Alexandria, Virginia
	.	November 22, 2019
JONATHAN HAYES, Director,	.	10:07 a.m.
Office of Refugee	.	
Resettlement, et al.,	.	
	.	
Defendants/Respondents.	.	
	.	
. . . . .	.	

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS/ PETITIONERS:	REBECCA R. WOLOZIN, ESQ. SIMON SANDOVAL-MOSHENBERG, ESQ. Legal Aid Justice Center 6066 Leesburg Pike, Suite 520 Falls Church, VA 22041 and DALLIN G. GLENN, ESQ. Sterne, Kessler, Goldstein & Fox PLLC 1100 New York Avenue, N.W. Washington, D.C. 20005
-------------------------------------	--

FOR THE DEFENDANTS/ RESPONDENTS:	DENNIS C. BARGHAAN, JR., AUSA CATHERINE M. YANG, AUSA JEFFREY A. HALL, SAUSA United States Attorney's Office 2100 Jamieson Avenue Alexandria, VA 22314
-------------------------------------	---

ALSO PRESENT:	KATRINA HODGES, ESQ.
---------------	----------------------

(Pages 1 - 25)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR  
2 U.S. District Court, Third Floor  
3 401 Courthouse Square  
4 Alexandria, VA 22314  
5 (703)299-8595  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 P R O C E E D I N G S

2 THE CLERK: Civil Action 18-903, J.E.C.M., et al.  
3 versus Jonathan Hayes, Director, Office of Refugee  
4 Resettlement, et al. Would counsel please note your  
5 appearances for the record.

6 THE COURT: Mr. Barghaan, you've got so much paper  
7 there, I don't know what -- we're not trying the case.

8 MR. BARGHAAN: It's pretty much all that I do now,  
9 Your Honor. It's some sort of manual labor.

10 THE COURT: All right, counsel, do you want to  
11 identify yourselves for the record, please?

12 MS. WOLOZIN: Good morning, Your Honor. My name is  
13 Becky Wolozin; I'm with Legal Aid Justice Center; and my  
14 cocounsel, Dallin Glenn, is with Sterne, Kessler, Goldstein &  
15 Fox; and Simon Sandoval-Moshenberg is also with Legal Aid  
16 Justice Center.

17 THE COURT: Good morning.

18 MS. WOLOZIN: And just for Your Honor's knowledge,  
19 I'm prepared to discuss the due process claims, and my  
20 cocounsel will discuss the claims related to the ICE sharing  
21 policy.

22 THE COURT: All right.

23 MS. WOLOZIN: Thank you.

24 THE COURT: And for the defense?

25 MS. YANG: Good morning, Your Honor. Catherine Yang

1 from the U.S. Attorney's Office, on behalf of the government.  
2 With me today are my colleagues, Dennis Barghaan and Jeffrey  
3 Hall. Along with us we have agency counsel from the Department  
4 of Health and Human Services, Katrina Hodges.

5 THE COURT: All right. Well, what we have on the  
6 record this morning is the plaintiffs' motion for summary  
7 judgment and the federal defendants' motion for summary  
8 judgment, which both sides have briefed extensively, so I don't  
9 need to hear a whole lot of argument, but I would like, I guess  
10 we'll start with the plaintiffs.

11 And I'm curious, the question I first have is what,  
12 what is the actual remedy you're seeking under Count 1? What  
13 do you want the Court to do in this case on Count -- as to  
14 Count 1?

15 MR. GLENN: Thank you, Your Honor. As to the ICE  
16 sharing policy?

17 THE COURT: Yeah.

18 MR. GLENN: The, the Count 1 -- I'm sorry, could you  
19 refresh me, is that -- is Count 1 the --

20 THE COURT: I just want to know, again, this is a  
21 very difficult and complicated case because we're dealing --  
22 and my greatest concern is with minors. I know there's also an  
23 issue about, you know, the family members' rights to family  
24 unification and having access to these children, but the real  
25 concern, and it should be for everybody in this case, is how

1 these unaccompanied minor children are being handled, and I  
2 don't -- I don't think anyone disputes the fact that it's not  
3 in these children's best interest for them to be held in ORR  
4 custody any longer than necessary. I mean, that's a  
5 fundamental everybody agrees on.

6 And the second fundamental that everybody agrees on  
7 or should agree upon is that the placement of these children is  
8 a very serious responsibility that the government has, and it  
9 has to make sure that wherever the children are placed is a  
10 safe environment. I don't think anyone disputes that. And  
11 that should be the core and sole interest of the federal  
12 defendants in this process.

13 And so what you have done in your case -- and this  
14 case, of course, has been morphing because the government's  
15 been changing the policy and even some of the legislation now  
16 has changed some of the original problems that existed when  
17 this case was first filed. So it's a case that has been  
18 constantly morphing, but we're at this point now where both  
19 sides are asking the Court, you know, to either end the  
20 litigation or significantly reduce the amount of issues that  
21 would have to go forward to litigation.

22 And so, you know, in looking at the situation, if the  
23 plaintiff could get exactly what the plaintiffs want, what is  
24 it you want out of this litigation?

25 MR. GLENN: Yes, Your Honor. The plaintiffs seek to

1 have the ICE sharing policy set aside for failure to follow  
2 notice and comment as being contrary to law.

3 THE COURT: And by that you mean you don't want ORR  
4 having anything to do with ICE? Is that what you're asking, no  
5 communication with ICE whatsoever about this process?

6 MR. GLENN: No, Your Honor. We're referring to  
7 specific portions of the MOAs; that's particularly section 5.

8 THE COURT: All right.

9 MR. GLENN: And then the ORR guide at section 2.5.

10 THE COURT: All right. And specifically, what do you  
11 want the Court to tell the government it can no longer do?

12 MR. GLENN: We want the Court to tell them that they  
13 can no longer enforce those provisions, that they're set aside.

14 THE COURT: All right. And that, that is what you're  
15 seeking in this case?

16 MR. GLENN: Yes, Your Honor.

17 THE COURT: All right. Let me have the government  
18 respond to that. And that is, specifically if, if you are not  
19 permitted to interact with ICE in that respect, to what extent  
20 does that limit your ability to safely vet the custodial  
21 situations for these minors?

22 MS. YANG: Yes, Your Honor. With respect to the  
23 coordination between ORR and DHS, that coordination, as Your  
24 Honor is aware, goes back many years and is expressly permitted  
25 in the TVPRA, which contains an express provision that says

1 that when ORR makes a request for information that it can use  
2 in the sponsor assessability assessment process, DHS must by  
3 statute provide that information.

4 So our position is that it's not appropriate to, to  
5 prohibit ORR and DHS from sharing information about sponsors  
6 because that is the very type of coordination that's  
7 contemplated by the statute.

8 THE COURT: Now, as I understand it, the current  
9 state of legislation prohibits DHS from using any of that  
10 information; that is, they've been contacted by ORR to check  
11 out a particular individual or group of people; and as I  
12 understand, the current legislation prohibits DHS from then  
13 saying, oh, we can now look at this person, and if their status  
14 is illegal, we can take action against them.

15 MS. YANG: That's correct.

16 THE COURT: Do I understand --

17 MS. YANG: That's correct, Your Honor.

18 THE COURT: But I also understand that's simply a  
19 statute that's going to expire, I believe, in November of this  
20 year.

21 MS. YANG: No, Your Honor. Just yesterday, Congress  
22 passed another continuing resolution.

23 THE COURT: For 30 days.

24 MS. YANG: For another 30 days, so that brings us to  
25 the end of December. And to the point of the continuing

1 resolution being, you know, having a temporal scope, the fact  
2 that there is a temporal scope doesn't make it any less of a  
3 statute. Fourth Circuit authority is clear that even an  
4 appropriations rider is still a full-blown statute, and so long  
5 as it remains in effect, that a separate aspect -- the  
6 legislation is a separate legislative activity in addition to  
7 the agency action that has really removed the issue from being  
8 a live one.

9 THE COURT: But as you know, I mean, the, the  
10 plaintiff has pointed to and I'm certainly very much aware of  
11 the Fourth Circuit's *Porter* decision which goes to this issue  
12 about, you know, whether -- the fact that a government entity  
13 has changed a practice that would otherwise be problematic  
14 doesn't necessarily mean that the issue is moot unless there is  
15 some kind of a guarantee or a very clear acknowledgement by the  
16 government that it's not going to engage in such conduct in the  
17 future.

18 What do we have in this record that would indicate to  
19 the Court that the government has taken a position which would  
20 strongly indicate that there's not going to be a change in this  
21 policy prohibiting the DHS from using any of this information  
22 to enforce the immigration laws?

23 MS. YANG: Yes, Your Honor. And I think in this  
24 respect, it's important to consider both pieces of the MOA that  
25 was originally challenged in this case. As Your Honor is



1 aware, it contained both a fingerprinting requirement and then  
2 also the separate information-sharing piece.

3 The fingerprinting requirement is that which is  
4 solely within the control of, of HHS, of ORR, and in that  
5 respect, that policy has been rescinded for nearly a year at  
6 this point. ORR has rearranged its program operations around  
7 that change. ORR's director and leadership have given sworn  
8 testimony to Congress stating that they are in support of those  
9 operational directives that made the change. They have  
10 indicated that they have no foreseeable intent of returning to  
11 that fingerprint policy.

12 Counsel through our papers and here today, we are  
13 making our presentation to the Court that ORR has no  
14 foreseeable intent of returning to those policies. In addition  
15 to that agency action, Congress also has legislated that ORR is  
16 not permitted to use any of its funds to rescind any of those  
17 operational directives on its own. So that's the  
18 fingerprinting piece.

19 With respect to the information-sharing piece,  
20 there's nothing that ORR can do to control the way that DHS  
21 uses information, but the legislature has -- and as I noted  
22 before, Congress has placed restrictions on the ability of DHS  
23 to use that information for immigration enforcement. So I  
24 think --

25 THE COURT: But that's only in place through the end

1 of December.

2 MS. YANG: That's correct; however, any future  
3 appropriations activity that -- any future restrictions that  
4 Congress places on the appropriations that they, that they  
5 provide and authorize for DHS, firstly, there's been no  
6 indication that Congress would, would go back to -- would  
7 remove the restrictions that they have so far imposed on DHS,  
8 and it's, it's really going down the precarious path of  
9 speculating about what the legislature might do, but in this  
10 respect, I think there are a few things that make this case  
11 different from the *Porter* case.

12 One of them is this, this additional element of  
13 legislative action that additionally moves the issue beyond  
14 just what the agency itself --

15 THE COURT: All right, let me ask you about that  
16 legislative action. Was there any vigorous discussion of this  
17 element of information sharing during the course of that  
18 statute being enacted, in other words, within either the  
19 congressional debates? Was the issue clearly before the  
20 legislators so that we can look at this legislation as truly  
21 reflecting a reasoned consideration of the issue, or was it one  
22 of these things, as we all know with federal legislation,  
23 frequently there are little riders and little attachments that  
24 practically no one has read and it gets passed and now that's  
25 the law but no one really thought about it?

1           What do we have in the record indicating that this  
2           was an issue that was significantly discussed, thought about,  
3           and therefore one can say was, you know, seriously intended as  
4           expressing congressional will?

5           MS. YANG: I think we have the testimony involving  
6           both DHS as well as HHS before the House Appropriations  
7           Committee. In fact, I believe that testimony at least by DHS  
8           was one that the plaintiffs attached as an exhibit to their, to  
9           their papers in which the information-sharing piece and the  
10          alleged fears of immigration enforcement were discussed  
11          extensively.

12          I also know that at least on behalf of HHS, its  
13          director and its leadership have also participated in hearings  
14          before the Appropriations Committee. That also occurred in  
15          July of this year.

16          THE COURT: And how was the vote? Was it unanimous  
17          or was there -- was it one of these close votes?

18          MS. YANG: I'm not sure, Your Honor.

19          THE COURT: Does anybody know how the vote was on  
20          that piece of legislation? My understanding is on the  
21          continuing resolution, it was not unanimous. In fact, I think  
22          it was a smaller margin than it has been in the past. Am I  
23          correct about that, that there were a fair number of dissenting  
24          votes?

25          MS. WOLOZIN: I don't know the exact count --

1 THE COURT: Up --

2 MS. WOLOZIN: I'm sorry. I don't know the exact  
3 count, Your Honor, but I do know it wasn't unanimous enactment,  
4 and as to the continuing resolution, I'm not aware --

5 THE COURT: All right.

6 MS. WOLOZIN: -- but when it was initially placed.

7 THE COURT: All right, go ahead.

8 MS. YANG: There are a few other elements that I  
9 wanted to discuss in which this case is different from that in  
10 *Porter*, and one of them is, as I mentioned, the additional  
11 piece of the legislative activity that separately missed the  
12 issue, but a second one is that in *Porter*, the issue was the  
13 underlying constitutionality of previous conditions of  
14 confinement in a prison.

15 In this case, plaintiffs have never asked the Court  
16 to find that it's unconstitutional in some way to require  
17 fingerprints from sponsors, and I think, candidly, they would  
18 be hard-pressed to do so because every state child welfare case  
19 uses fingerprints in every case.

20 So, so I think that also is a distinction because  
21 they're not asking that the underlying requirement of providing  
22 fingerprints is somehow unlawful. So I think that's also a  
23 concern that was animating the court in *Porter*, where there was  
24 a concern that absent some, some guarantee that the prison  
25 would not return to those conditions, that somehow those

1 unconstitutional conditions would return.

2           And just as a, another note, with respect to  
3 acquiring the injunction that plaintiffs are seeking in this  
4 case, they bear the burden of showing that there's going to be  
5 no significant threat of recurrence. Our position is that  
6 through the assurances that ORR has made, including the  
7 assurances that counsel has made to this Court and that its  
8 leadership has made to Congress, that ORR has no foreseeable  
9 intent of returning to the fingerprinting policy, which really  
10 just leaves us then at the end of the day with this  
11 information-sharing practice between federal agencies.

12           And as Your Honor is aware from our briefing, the  
13 Fourth Circuit earlier this year held that information sharing  
14 on its own does not, does not bring any sort of agency action  
15 that is subject to review under the APA, because information is  
16 routinely shared among federal agencies. That's part of how  
17 the federal government works.

18           So at the end of the day, our position is that we're  
19 really left with just information sharing and that the Fourth  
20 Circuit has said very squarely that that's not an agency  
21 action.

22           THE COURT: But the problem in this particular case  
23 is that the information sharing at least initially when this  
24 case was first filed almost resulted in counterproductivity,  
25 and that is, if the goal of ORR was to get these children

1 placed in a -- but by sharing the information without any  
2 restrictions on what Homeland Security could do with the  
3 information, in some cases, the fear was that otherwise  
4 eligible sponsors became ineligible because they were going to  
5 be deported or that they were being intimidated and therefore  
6 not coming forward.

7 And so the information sharing was actually cutting  
8 against ORR's interest in getting these kids placed, and so I  
9 don't think this is exactly the same as just raw information  
10 sharing. It doesn't make sense that one agency would be  
11 sharing information that could result in the agency being  
12 frustrated in achieving its goals, and I think that was part of  
13 the problem.

14 MS. YANG: I would push back on, on that  
15 characterization, Your Honor, and that's because again, this --  
16 I think this is where the distinction between the fingerprint,  
17 expanded fingerprint policy and the information sharing really  
18 does matter, the distinction really does matter, because what  
19 ORR observed was that there was a correlation certainly between  
20 the amount of time that it took for household members to submit  
21 their fingerprints and that that -- there was a correlation  
22 between that requirement, the fingerprinting requirement, and  
23 the amount of time the children were spending in care.

24 There was no similar finding in terms of the  
25 information-sharing piece, and as we've learned from discovery,

1 there really was no -- the alleged effect of immigration  
2 enforcement deterring sponsors from coming forward really  
3 hasn't been borne out by the discovery in this case both with  
4 respect to the individual sponsor plaintiffs themselves and  
5 their own experiences but also in the undisputed data and the  
6 undisputed expert testimony that's been taken in this case that  
7 hasn't revealed any sort of general deterrence in terms of  
8 sponsors coming forward.

9           So I think in that respect, it is important to  
10 remember the distinction between the fingerprints and the  
11 information sharing. The fingerprints, which was the piece  
12 that had a correlation to the increased length of care, that  
13 has long -- no longer been the policy of ORR. The  
14 information-sharing piece that remains and that is really just  
15 information sharing between federal agencies, as the *City of*  
16 *New York* case recognized, really just leaves us without any  
17 real material collateral effect that plaintiffs have been able  
18 to demonstrate.

19           THE COURT: All right, thank you.

20           MS. YANG: Thank you.

21           THE COURT: I'll hear from the plaintiff.

22           MR. GLENN: Your Honor, with respect to mootness,  
23 defendants have to show under *Porter* that there is an  
24 unconditional and irrevocable agreement that they won't return  
25 to the challenged conduct. They have represented that they

1 have no foreseeable intent, and Your Honor can judge what that  
2 means, but it sounds to us like that they keep open the  
3 possibility of returning in the future if circumstances change.

4           There are a number of factors that show that they,  
5 they do have an intent to resume the conduct. First is that  
6 the MOA has not been rescinded, even though ORR officials  
7 testified that it should be and ORR has the authority under  
8 section 10 of the MOA to rescind it with 30 days' notice,  
9 without cause, unilaterally.

10           Second is that pursuant to the MOA, ORR continues to  
11 share fingerprints with ICE in every case where fingerprints  
12 are gathered, even though they are not using those  
13 fingerprints. That, that is an undisputed fact, 13 in our  
14 plaintiffs' brief, Your Honor.

15           Another undisputed fact from our brief is that the  
16 operational directives that rolled back some of, some of the  
17 policies were intended to be temporary. That's undisputed fact  
18 11, Your Honor.

19           And finally, the funding restrictions are temporary.  
20 They'll expire on December 20. And *Renee v. Duncan* is the --  
21 is most instructive on that point, that an appropriations bill  
22 that temporarily constrains the agency action does not moot  
23 that action going forward.

24           THE COURT: All right, thank you.

25           All right, let me see if I have any other questions



1 or any other issue that I want to raise. There has been in the  
2 course of this case some concern about the different categories  
3 of sponsors, and I am curious, I guess this question again is  
4 for the defendants, what's the rationale ORR has used for  
5 providing different levels of notice and appeal rights to  
6 Category 1 versus Category 2 sponsors?

7 MS. YANG: Certainly, Your Honor. The rationale is  
8 that ultimately at the end of the day, constitutional due  
9 process is particularized to the circumstances of the cases,  
10 and in ORR's view and as is reflected in state child welfare  
11 practice, parents have fundamental rights to the upbringing of  
12 their children. ORR recognizes those rights, and so it's  
13 provided -- in addition to the process that it provides during  
14 the sponsorship application process, ORR has chosen to provide  
15 an additional hearing at the end of that process if a parent is  
16 denied, in full recognition that in state law and in state  
17 jurisdictions, parents are given that fundamental right to  
18 their children.

19 That same right is not recognized either under  
20 federal standards or state standards with respect to nonparent  
21 relatives; and so the rationale really is first that, that  
22 there's a difference in the rights, in the legal protections  
23 that are available for parents versus nonparents; and secondly,  
24 that when you start expanding constitutional due process out in  
25 this manner, that increases the burden on the agency.

1           As Your Honor is familiar from our papers, the way  
2 that these hearings are conducted is that the assistant  
3 secretary of Health and Human Services presides over the  
4 hearing, and the individual federal field specialist who made  
5 the decision in the case appears and testifies and basically  
6 explains why he or she made the decisions that they did.

7           By expanding these types of hearings out to  
8 categories of relatives or other adults who in state, in state  
9 law don't have the same recognized right imposes an additional  
10 burden on ORR by taking resources away from those FFSSs who  
11 continue to have the same caseloads, continue to need to review  
12 individual cases, make release decisions, consult with the case  
13 managers who are handling those cases, and by taking their  
14 attention away from those individual cases to testify in  
15 hearings, we don't believe actually serves the interests of  
16 either the program or the children who ORR is trying to place  
17 safely with sponsors.

18           THE COURT: All right. Do you want to respond to  
19 that?

20           MS. WOLOZIN: Yes, Your Honor.

21           THE COURT: Yes.

22           MS. WOLOZIN: First of all, as a matter of fact shown  
23 in our evidence, there have been absolutely no appeals under  
24 the current process, and so the argument that it is overly  
25 burdensome is based on some hypothetical that has actually

1 never taken place, because a Category 1 sponsor has never  
2 either had the inclination or opportunity to take advantage of  
3 that appeals process, and part of the reason that that is the  
4 case is because ORR argues that it should have unlimited  
5 discretion in the scope of its investigations and in the time  
6 it takes to conduct those investigations, and that only when it  
7 decides it has a final decision are there any procedures  
8 available even to a Category 1 sponsor.

9 THE COURT: Okay.

10 MS. WOLOZIN: A second brief note, Your Honor, is  
11 that while there may be a difference between a Category 1 and  
12 Category 2 sponsors in terms of the weight of the  
13 constitutional interest, the child certainly has an equally  
14 strong interest in liberty, regardless of whether it is a  
15 Category 1 or a Category 2 sponsor, and so there's not a good  
16 rationale for only providing process to those whose parents  
17 happen to be the ones that are trying to get them out.

18 THE COURT: All right. Now, the bottom line, though,  
19 appears to be from the evidence you-all have presented, is that  
20 the time in which the children are being kept in ORR custody  
21 has significantly decreased and is now, as I understand it,  
22 well under even the 60 days, which was considered sort of the  
23 rational limit. Everybody originally felt more than 60 days  
24 was not good, and I think it's down to, what, 30 or 40. I  
25 mean, it's down significantly.

1 I want to see what -- how you respond to that in  
2 terms of whether or not the plaintiffs, by having initially  
3 filed this lawsuit, have not actually achieved essentially what  
4 you really were trying to get, which was a shortened time  
5 period.

6 MS. WOLOZIN: Your Honor, this lawsuit is about the  
7 children who are not released within that time frame. We're  
8 very happy that more children are being released faster;  
9 however, 20 percent of the population by defendants' own data  
10 are not released within 60 days; and for those children who are  
11 not released within that time frame, even excluding -- using  
12 the class list, even excluding those in federal foster care,  
13 their average time in custody is 172 days; and due process is  
14 to protect those children in the difficult cases where they are  
15 having to wallow in custody waiting for decisions, where  
16 there's just no process to protect them once very weighty  
17 constitutional interests come into play.

18 We also included, I forget exactly which exhibit, but  
19 for children in custody over 50 days, which was another metric  
20 we found ORR tracks through discovery, those children likewise  
21 had an average time in custody over 100 days.

22 And so for the children, the 20 percent of children  
23 that are in ORR custody, they are nowhere near the 30-day total  
24 population goal, and some of them -- many of them, as we've  
25 shown through the certified class, have Category 1 or

1 Category 2 sponsors.

2 And it's especially for those children who are stuck  
3 where it's not going smoothly, where procedural due process  
4 rights are so important and it is so important to protect their  
5 rights and their families' rights.

6 THE COURT: All right. I want to hear a response to  
7 that.

8 MS. YANG: As Your Honor noted, the average length of  
9 care for children in the many months before today has gone down  
10 significantly. Now, plaintiffs point to the 20 percent across  
11 the program, I should note, that do remain in care for more  
12 than 60 days, and really, I think, I think this argument rests  
13 on at least one fundamental incorrect assumption, which is that  
14 that amount of time is attributable to ORR, in other words,  
15 that ORR has caused that deprivation, but as we've argued in  
16 our papers and as we've supported with the exhibits attached to  
17 our papers, ORR is not -- there cannot be a bright line rule  
18 that says ORR is responsible for -- is solely responsible for  
19 the amount of time that children spend in care.

20 If I could give a few examples that maybe would  
21 demonstrate this to the Court, the way that plaintiffs define  
22 the issue would include -- would reach the conclusion that ORR  
23 has deprived the due process rights for a child who is in ORR  
24 custody for 59 days and then on day 60 identifies a sponsor.

25 Under that -- under those sets of circumstances, they

1 would still be included in the class as it's been defined in  
2 this case, but I don't think that the conclusion could follow  
3 that ORR has deprived them of any procedural due process.

4           Similarly, we have instances from the plaintiffs in  
5 this -- the named plaintiffs in this case as well as the absent  
6 class members where a child has identified a sponsor who  
7 initially says they will apply but then they become  
8 nonresponsive or they become nonresponsive for a certain period  
9 of time, and during that time, ORR reaches out to them, follows  
10 up to them, tries to get them to participate, but for whatever  
11 reason, and it can be entirely benign, life getting in the way,  
12 any other number of reasons, the sponsor chooses either not to  
13 respond or removes themselves from the process. Again, in that  
14 circumstance, I don't think the conclusion can follow that ORR  
15 has somehow deprived the child of due process.

16           So I think that's one very fundamental element that's  
17 been glossed over in the briefing, but it is significant in  
18 terms of figuring out whether ORR has caused a deprivation in  
19 any sense.

20           THE COURT: All right, thank you.

21           Did you want to respond to that?

22           MS. WOLOZIN: Yes, Your Honor. First, I would note  
23 that in terms of the named plaintiffs, all sponsors came  
24 forward nearly immediately, and this is one -- this sort of  
25 disappearing or nonresponsiveness is one way in which all of

1 the counts in this case are intertwined because many of the  
2 examples that defendants are referring to were resulting from  
3 fear generated by the ICE sharing policy, and so sponsors were  
4 unable to complete sponsorship applications or unable to  
5 convince household members to complete them, and so I wanted to  
6 flag for the Court that these are interrelated.

7 Second, at defendants' insistence, we included a  
8 hypothetical remedy to show that it is possible to account for  
9 these variations in families and for variations in sponsor  
10 responsiveness, and so I'll note that in our example, we noted  
11 perhaps a hearing would only be available to sponsors who have  
12 completed a sponsorship reunification packet. In that case, if  
13 a sponsor comes forward on day 59 and has not yet submitted a  
14 sponsor reunification packet, in this hypothetical, there  
15 wouldn't be a hearing.

16 And so while defendants are best placed to determine  
17 the proper procedure, we offer that example as a way to show  
18 that there are ways to target relief within their procedural  
19 designs specifically to the situations in which there is a very  
20 strong interest and right to be heard and protected.

21 THE COURT: All right.

22 MS. YANG: Your Honor, may I very quickly --

23 THE COURT: Yes, ma'am, go ahead.

24 MS. YANG: Thank you, Your Honor. And I'll very  
25 quickly just note that plaintiffs' response just now indicated

1 that the reason the names -- the named sponsor plaintiffs  
2 delayed in providing information was because of fears of  
3 immigration enforcement. Respectfully, Your Honor, as we've  
4 laid out in our papers, the evidence -- their testimony at  
5 deposition under oath does not support that fact. So I wanted  
6 to point that out.

7 I will be the first to admit that there are some  
8 cases where there are household members who do not want to be  
9 fingerprinted. Again, the fingerprinting and the threat of --  
10 or the fear of immigration enforcement are separate, and as  
11 we've laid out in our papers, there's been no specific showing  
12 that any, any fears of immigration enforcement were  
13 specifically due to the issues that are, that are challenged in  
14 this particular case.

15 THE COURT: All right. Well, obviously, we're going  
16 to take this matter under advisement. These are serious issues  
17 in these motions, and the record is fairly dense.

18 I would be interested, though, since it happened  
19 yesterday and that was not in either of your briefs, both sides  
20 are invited to provide the Court with more data, information  
21 about what went on with any discussions in the continuing  
22 resolution, and in particular, I am concerned because the  
23 mootness issue is, I think, a significant issue in this case.  
24 It certainly is significantly argued by the defendants.

25 And it is a strange situation where we have, you



1 know, the -- you can't predict what Congress is going to do,  
2 and obviously, the political environment keeps shifting. It  
3 may be very different in a year one way or the other, and so we  
4 have to look at this case very carefully. But I would be  
5 interested in seeing what at least the current discussion of  
6 this issue is on the legislative level, and so since we just  
7 had action yesterday, I would be interested in that, all right?

8 Nothing further then, we'll recess court.

9 MR. SANDOVAL-MOSHENBERG: Your Honor?

10 MR. BARGHAAN: Your Honor?

11 THE COURT: Yes, Mr. Barghaan? Was there a question?

12 MR. BARGHAAN: I was going to ask exactly the same  
13 thing, so --

14 THE COURT: In terms of time?

15 MR. BARGHAAN: May we have two weeks from today to  
16 file?

17 THE COURT: Yes. 14 days from today, yes, 14 days.  
18 Congress may do something in the interim, too, so be careful.

19 All right, we'll recess court until 11:00.

20 (Which were all the proceedings  
21 had at this time.)

22 CERTIFICATE OF THE REPORTER

23 I certify that the foregoing is a correct transcript of  
24 the record of proceedings in the above-entitled matter.

25 /s/  
Anneliese J. Thomson